Exhibit 3: FCC Reply Memorandum

#102

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

DONNA CRAIN, et al., Plaintiffs,	)	
v.	)	Case No. 96-LM-983
LUCENT TECHNOLOGIES, et al., Defendants.	)	

REPLY OF FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE

The Federal Communications Commission ("FCC" or "the Commission") has asked the Court's leave to file a memorandum as amicus curiae addressing the issue of preemption. The Court's March 10, 1999 Order dismissing the complaint in this case had relied entirely on FCC orders in finding that the plaintiffs' claims were "preempted by federal law." The FCC sought, through its amicus filing, to inform the Court of its own views as to the meaning of its orders in the context of preemption. The FCC expressly took no position on the merits of the plaintiffs' claims, but sought only to advise the Court of its intentions in the orders that had formed the basis for the March 10, 1999 dismissal order.

In opposition to the Commission's motion for leave, the defendants argue (1) that Illinois procedures do not contemplate amicus participation at the trial court level, (2) that the Commission's memorandum is not a proper amicus filing in any event because it "advocate[s] one party's position over another's," and (3) that the Commission has misunderstood both this Court's preemption ruling and the Commission's own earlier orders. The defendants also (4) respond on the merits to the Commission's memorandum, and present their counsels' recitation as to the nature and content of conversations in which FCC counsel informed the defendants' counsel of

the agency's intention to submit an amicus filing. We respond as follows to defendants' opposition:

(1). The FCC does not presume to advise the Court as to its authority to accept the FCC's amicus memorandum. It does, appear, however, that an Illinois circuit court, in some instances, can allow amicus participation, and that the general rule is that such participants may not engage in substantive motions practice. See Petition to Call an Election on the Question of Incorporating the Village of Forest Knoll, 164 Ill.App.3d 392, 393, 517 N.E. 2d 1188, 1190 (1987).[1] The parties may more appropriately brief this procedural issue, but it is important to note that the FCC has not sought to file a motion in this proceeding other than its motion for leave to participate as amicus curiae through submission of its proposed brief. Moreover, a specific federal statute, 28 U.S.C. § 517, provides that the Attorney General may send any official of the Department of Justice "to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." See Lasidi, S.A. v. Financiera Avenida, S.A., 73 N.Y.2d 947, 948, 538 N.E. 2d 332, 540 N.Y.S. 2d 980, 981 (1989) (noting submission by United States Attorney General of a "suggestion of interest" concerning an issue of diplomatic immunity in context of a discovery dispute).

---

[1] Illinois appellate courts have permitted other federal agencies to participate as amicus curiae in such appeals. See National Commercial Banking Corp. of Australia, Ltd. v. Harris, 125 Ill.2d 448, 451; 532 N.E.2d 812, 813; 126 Ill. Dec. 941, 942 (1988)(Office of Comptroller of the Currency); Coldwell Banker Residential Real Estate Services of Illinois v. Clayton, 105 Ill.2d 389, 392; 475 N.E.2d 536, 537; 86 Ill. Dec. 322, 323 (1985)(Federal Trade Commission); Olsen v. Financial Fed. Sav. & Loan Ass'n, 105 Ill.App.3d 364, 434 N.E.2d 406, 407; 61 Ill. Dec. 322, 323 (1982)(Federal Home Loan Bank Board).

(2). The Commission's memorandum expressly declines to take a position on the merits of the plaintiffs' claims and, therefore, does not "advocate one party's position over another's." It does, obviously, take a position on the question of preemption; there would be no purpose in the FCC's submitting a paper that did not. But an amicus filing clearly may take a position that favors one outcome (or even one party) in litigation over another. Indeed, the Federal Rules of Appellate Procedure, which specifically authorize amicus filings in some circumstances, require such filing within seven days after the filing of the brief of the party "being supported." FRAP 29(e) (1999).[2] An amicus should be independent of the parties; but it need not be neutral or indifferent as to the issues it addresses. One seeking to participate as amicus would surely be denied leave if it had no views that were pertinent to the controversy.

(3). The Commission interpreted the Court's March 10, 1999 dismissal order as finding preemption for two reasons, both of them arising from the Commission's actions in detariffing Customer Premises Equipment ("CPE"). First, the Court found that the Commission's program of transition to deregulation had required certain steps by AT&T (and eventually by Lucent Technologies, Inc.) that could not be challenged in a state lawsuit arising from conduct that

---

[2] Leigh v. Engle, 535 F. Supp. 418, 421 (N.D. Ill. 1982), cited by defendants, is distinguishable. That court determined that the Secretary of Labor would be denied amicus status in the trial level court because the Secretary supported plaintiffs' legal theories and supported entry to judgment for plaintiffs. Here, the FCC's role is far more limited. See also Waste Management of Pennsylvania, Inc., v. City of York, 162 F.R.D. 34, 36-37 (M.D. Pa. 1995)(permitting amicus participation by Environmental Protection Agency, which had "a special interest in this litigation as it is the primary body responsible for administering and enforcing" the statute at issue); Wilson v. Al McCord, Inc., 611 F. Supp. 621, 622 (W.D. Okla. 1985), aff'd in part and rev'd in part on other grounds, 858 F.2d 1469 (10th Cir. 1988) (permitting amicus participation by state securities regulator); Grimes by Grimes v. Sobol, 832 F. Supp. 704, 712 (S.D.N.Y. 1993) (permitting amicus letter by federal Department of Education), aff'd, 37 F.3d 857 (2d Cir. 1994); In re Roxford Foods Litig., 790 F. Supp. 987, 997 (E.D. Cal. 1991) (permitting amicus brief by federal Department of Agriculture). .

occurred during the transition period. More broadly, the Court found that the FCC's "regime of deregulation" after the transition, and its intention to rely on the "forces of the market" foreclosed the application of state consumer protection laws to the offerings of CPE by AT&T (and Lucent). It was this second, broad preemption finding that prompted the Commission's submission.

The defendants appear to deny that the Court made such a "broad pronouncement." But the Court's order speaks for itself, and the breadth of its second reason for preemption is clear. See March 10 Order at 2-3. Thus, for example, the Court found that an allegation under state law that AT&T has imposed unconscionable rental charges for CPE, even after the transition, is foreclosed because it is inconsistent with the Commission's determination to rely on market forces after deregulation. That finding, moreover, is directly responsive to the argument made in the defendants' Memorandum of Law in Support of motion for Judgment ... or Alternatively to Dismiss or Stay (filed Jan. 5, 1999), at 17-18. The FCC's proffered amicus memorandum addresses that finding and informs the Court that the Commission had no intention to preempt such scrutiny of AT&T's charges and practices. The Commission's intention with regard to preemption is central to the analysis of an argument that the agency's action has a preemptive effect. E.g., Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982). Indeed, AT&T and Lucent themselves now have asked the Commission to issue a declaratory ruling on this very question.

(4). The FCC does not reply to the defendants' response on the merits to the FCC's memorandum, on the assumption that an amicus properly presents its views in a single filing and does not engage in debate through subsequent pleadings. Second, the FCC also does not offer its counsels' rejoinder concerning the nature and content of FCC counsel's discussions with

counsel for the defendants when the FCC attorney called to inform them of the FCC's intention to offer its views to the Court as amicus curiae, although the FCC does not agree with the defendants' characterization of those discussions in some respects.

CONCLUSION

For the reasons stated in the FCC's motion for leave and in this Reply, the Commission respectfully asks the Court to accept the FCC's memorandum and to consider it in its determination of the preemption issue raised in the pending motion for reconsideration.

Respectfully submitted,

PHILIP D. BARTZ
Acting Assistant Attorney General

W. CHARLES GRACE
United States Attorney
For The Southern District of Illinois

MICHAEL THOMPSON
Assistant United States Attorney
Nine Executive Drive, Suite 300
Fairview Heights, Illinois 62208
(618) 628-3700
Attorney No. 02823675

Attorneys for the Federal Communications Commission

OF COUNSEL:
CHRISTOPHER J. WRIGHT
General Counsel
JOHN E. INGLE
Deputy Associate General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

PROOF OF SERVICE

DONNA CRAIN, et al., Plaintiffs,	)	
v.	)	Case No. 96-LM-983
LUCENT TECHNOLOGIES, et al., Defendants.	)	

The undersigned hereby certifies that she/he is an employee in the office of the United States Attorney for the Southern District of Illinois and is a person of such age and discretion as to be competent to serve papers.

That on June 11, 1999, she/he served a copy of the attached:

REPLY OF FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE MEMORANDUM AS AMICUS CURIAE

by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Nine Executive Drive, Suite 300, Fairview Heights, IL 62208.

ADDRESS(ES)
Louis F. Bonacorsi
Katrina G. Bakewell
James F. Bennett
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

Stephen M. Tillery
Matthew H. Armstrong
Lisa R. Kernan
Carr, Korein, Tillery, Kunin, Montroy & Glass
412 Missouri Avenue
East St. Louis, IL 62201

Janice Bradley